



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 674

IN THE MATTER
OF
SUSAN P. BERNSTEIN

DISPOSITION AGREEMENT

The State Ethics Commission and Susan P. Bernstein enter into this Disposition Agreement pursuant to Section 5 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On June 25, 2002, pursuant to G.L. c. 268B, § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Bernstein. The Commission has concluded its inquiry and, on October 23, 2002, found reasonable cause to believe that Bernstein violated G.L. c. 268A, § 17.

The Commission and Bernstein now agree to the following findings of fact and conclusions of law.

Findings of Fact

Bernstein's Conduct as Private Real Estate Broker

1. Bernstein has been an elected Framingham Planning Board member from 1991 to the present. As such, Bernstein is a municipal employee as that term is defined in G.L. c. 268A, § 1, and subject to the provisions of the conflict-of-interest law, G.L. c. 268A.
2. During the time relevant, Bernstein worked full-time as a real estate agent.
3. In March 2001, the property owner of 82 Leland Street in Framingham decided to sell the property. She retained Bernstein as her real estate broker on the sale.
4. Although the property in question was zoned for manufacturing use, most of the properties surrounding it were zoned for residential use and contained private residences. The property owner was concerned with preserving the residential

neighborhood and wanted to sell her property to someone who would use it for residential purposes. Thus, she discouraged offers from potential buyers looking to develop the property for uses that she felt would be detrimental to the neighborhood.

5. In July 2001, Bernstein received an offer on the property from a developer who wanted to use the property for residential purposes. He proposed subdividing the property, renovating the existing house, and building duplexes on the remaining lots. To do so, he would have to obtain a use variance from the Framingham Zoning Board of Appeals ("the ZBA"), or have the property rezoned to allow residential development.

6. On July 20, 2001, the owner and the developer ("the parties") executed a purchase and sale agreement, subject to the buyer's obtaining a use variance.

7. On July 27, 2001, the parties filed an application with the ZBA for a use variance regarding the property. They also submitted a petition from the neighbors in support of the use variance. On October 16, 2001, the ZBA voted 2-1 to deny the request because it did not see the need for a variance in this situation. The ZBA also indicated that it might be more appropriate to have Town Meeting vote to rezone the property.

8. The next Town Meeting was scheduled for April 2002.

9. In light of the ZBA's decision not to grant the use variance, the parties' purchase and sale agreement terminated in November 2001.

10. The property owner was discouraged by the turn of events and did not want to wait six months until Town Meeting could consider whether to rezone the property.

11. Bernstein discussed with the property owner the need to consider offers from buyers intending other than residential uses.

12. On December 5, 2001, Bernstein learned that there would be a Special Town Meeting held in January 2002. She also learned that the selectmen planned to open and close the warrant for the Special Town Meeting on December 6, 2001.

13. As there would not be enough time to collect 100 signatures (which would have required the selectmen to include the rezoning article on the Special Town Meeting warrant), Bernstein advised the property owner to draft a letter to the selectmen requesting that the board vote to include the article on the warrant.

14. The property owner faxed to Bernstein a letter asking the selectmen to include the rezoning article on the warrant, and Bernstein delivered it to town hall.

15. On December 6, 2001, Bernstein spoke with the town manager about the property owner's letter. Bernstein then telephoned the chairman of the Board of Selectmen and one other selectman, and discussed the proposed rezoning article.

16. On the evening of December 6, 2001, Bernstein presented the property owner's request to the selectmen, explaining the situation and asking the board to include the article on the warrant. Bernstein made clear that she was representing the property owner, her real estate client, in this matter.

17. The selectmen voted 3-1 against including the rezoning article on the warrant, primarily because other town boards had not yet had a chance to review the proposed article.

18. Subsequently—after obtaining more than the 200 signatures required to call a special town meeting—the property owner was able to get the proposed rezoning article on the warrant for a second Special Town Meeting held on January 9, 2002. Town Meeting voted in favor of the article 83-32, and the property was rezoned from manufacturing to residential.

19. On January 22, 2002, the parties executed a new purchase and sale agreement. The sale closed on February 22, 2002. Shortly thereafter, approximately one year after listing the property, Bernstein received a commission of \$6,400.63 from the sale.

20. At no time did Bernstein vote or participate in this matter as a Planning Board member, nor did she act as an agent for the property owner before any other town boards or committees, or at the Special Town Meeting.

Bernstein's Knowledge of Conflict-of-Interest Law

21. On a number of occasions in the years just prior to this situation, Bernstein had become familiar with the conflict-of-interest law by attending Ethics Commission seminars in January 1998 and May 29, 2001.

22. In August 2001, Bernstein received a private educational letter from this Commission regarding another conflict-of-interest matter. The letter advised Bernstein not to act as an agent for anyone other than the town in relation to a particular matter in which the town had a direct and substantial interest. The letter also warned that any similar conduct would be pursued more aggressively in the future.

Conclusions of Law

23. Section 17(c) prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent for anyone other than the same municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

24. The town's decisions regarding rezoning the property were particular matters in which the town was a party and had direct and substantial interests.

25. Bernstein acted as agent on behalf of the property owner on each of the following occasions: when she discussed the zoning change article with the town manager; when she discussed the zoning change article with the individual selectmen; and when she presented the proposed zoning change article to the board of selectmen. Thus, Bernstein acted as an agent for the property owner in connection with the rezoning particular matters.

26. Bernstein's actions as an agent for the property owner were not in the proper discharge of her official duties.

27. By acting as an agent for someone other than the town in connection with the particular matters, Bernstein violated § 17(c).¹

28. Bernstein fully cooperated with the Commission's investigation.

Resolution

In view of the foregoing violations of G.L. c. 268A by Bernstein, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Bernstein:

- (1) that Bernstein pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 17(c);² and
- (2) that Bernstein waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE_: February 12, 2003

¹ Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the town in relation to a particular matter in which the town is a party or has a direct and substantial interest. Bernstein's receipt of a commission, a form of compensation, for her role as real estate broker on this particular sale raises § 17(a) issues, but the Commission has chosen not to address those issues, in part because Bernstein's efforts regarding the rezoning particular matters did not succeed in facilitating the sale, which was the actual basis of her commission.

² This resolution reflects the Commission's concern that Bernstein violated § 17 despite her familiarity with the conflict-of-interest law, and despite her having previously, explicitly and in writing received notice from the Commission that such agency conduct would violate § 17.